Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

PATRICK W. HANIGAN and THOMAS H. HANIGAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 79-1609

(Ninth Circuit No. 79-1823)

PETITION FOR CERTIORARI
TO REVIEW DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

POLLEY & POLLEY
GAYNES & ROCKAFELLOW, P.C.
By: Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

Date of Mailing: April 11, 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

PATRICK W. HANIGAN and THOMAS H. HANIGAN, Petitioners,	]	NO._____
vs.	]	
UNITED STATES OF AMERICA, Respondent.	]	(Ninth Circuit No. 79-1823)

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TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	i
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS OF THE COURTS BELOW . .	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT. .	13
CONCLUSION	22
AFFIDAVIT OF SERVICE	

TABLE OF AUTHORITIES

	Page No.
Abney v. United States 431 U.S. 651 (1977)	3, 18
Bouie v. City of Columbia 378 U.S. 347 (1964)	20
Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541, 69 S.Ct. 1221 (1949)	3, 18
National League of Cities v. Usery 426 U.S. 833, 96 S.Ct. 2465 49 L.Ed 2d 245 (1976)	17
Rewis v. United States 401 U.S. 808, 91 S. Ct. 1056 (1971)	17
United States v. Culbert 98 S.Ct. 1112, 1117 (1978)	20
United States v. Lanza 260 U.S. 377 (1922)	3, 18

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Thomas and Patrick Hanigan, Petitioners herein, pray that a Writ of Certiorari issue to review the Opinion and Order of District Judge Richard Bilby dated December 14, 1979, the Order of the Ninth Circuit dated January 29, 1980, and the denial of Petitioners' Motion for Rehearing by the Ninth Circuit on March 27, 1980.

OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the District of Arizona (Bilby, D.J.) is reproduced in Appendix A. The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is reproduced in Appendix B. The denial of Petitioners' Motion for Rehearing in Banc is reproduced in Appendix C.

STATEMENT OF THE CASE

I. Jurisdiction of the Supreme Court.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 29, 1980. Petitioners' timely Petition to the Ninth Circuit for rehearing with a suggestion for rehearing in banc was denied on March 27, 1980. Title 28, United States Code, §§1291 and 1294, Abney v. United States, 431 U.S. 651 (1977), Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949), and United States v. Lanza, 260 U.S. 377 (1922), confer jurisdiction on this court to review the judgment in question by Writ of Certiorari.

II. Introduction.

The United States Court of Appeals for the Ninth Circuit in sanctioning the court's failure to dismiss this case, has sanctioned a new and drastically expansive interpretation of the "Hobbs Act", Title 18 U.S.C. §1951.

Departing from all prior law, and particularly decisional law among the circuits, the Ninth Circuit, and Judge Bilby, ruled that by virtue of allegedly robbing $40.00, a keyring, and a dollar bill respectively from three Mexican aliens traveling from Mexico towards Elfrida, Arizona in search of work at an agricultural business in the State of Arizona, that the defendants knowingly and willfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce.

Never before has there been a criminal prosecution under the Hobbs Act wherein the alleged victims were aliens, where the alleged victims were traveling on private property, where the alleged victims had no right to travel, where the alleged victims were trespassing, where the amounts involved were so insignificant, where the effects on interstate commerce were at best tenuous and linked only to possible consequences in the future, and

where the government has attempted to clothe a "civil rights" prosecution under the guise of a Hobbs Act case. Nor has there ever been a dual prosecution sanctioned where the dual prosecution has come as a result of political pressure, and in an attempt to punish the Hanigans for being successful in a three-week Arizona court jury trial in which the consequences to the Hanigans, if found guilty, would have been death.

Yet, in this criminal case, with no basis in prior law, the District Judge, and the Ninth Circuit have enlarged the scope of the Hobbs Act and have retroactively found that a cause of action has been properly alleged. It is submitted that the Ninth Circuit's erroneous expansion of the statute conflicts of all prior judicial constructions, and operates as Ex post Facto application of the statute in violation of due process.

Certiorari should be granted to review the departure from prior law, the Ex post Facto

application of the new and expansive definition of the Hobbs Act, and should end the government's attempt to harrass, and destroy the Hanigans by virtue of force.

As the District Judge in his Opinion noted..."If the Federal Government chooses to employ it, the Hobbs Act federalizes the vast majority of extortion and robberies in the country...." The basis of federal and state relations has been unalterably disturbed by the court's rulings to this point.

The Hanigans have been tried once, and are now being forced to face an additional prosecution based on politics, at a time when the court has no jurisdiction to proceed, therefore placing this case beyond the bounds of a proper "dual" prosecution.

III. Statement of Essential Facts.

Patrick and Thomas Hanigan are residents of Arizona, and live in Douglas, Arizona, an area close to the Mexican border. The area is

a hotbed of illegal alien traffic, and a repository for problems centering around illegal alien traffic. These problems include robbery, pillage, and fear. For almost nine years, a climate of fear has existed in Cochise County, Arizona based on the unalterable flow of illegal aliens and illegal alien robbers. Homes become but armed fortresses. Protection and fear become a way of life.

On August 18, 1976, three illegal aliens were allegedly robbed by George, Patrick and Thomas Hanigan. George W. Hanigan, the Father of Petitioners, is now dead. On August 19, 1976, the Cochise County Attorney, investigated the allegations. Shortly thereafter Riley was contacted by high governmental officials in the Mexican Government.

Riley's next move was to contact William Smitherman, the United States Attorney for the District of Arizona. Smitherman conducted an investigation and informed Mr. Riley that

"there are no violations of Federal law." This information was forwarded to the court by virtue of an affidavit of Mr. Riley.

The state charges were formally lodged on December 8, 1976, and included fourteen (14) counts as to each of the petitioners. The counts included allegations of kidnapping in violation of Arizona Revised Statute §13-491, conspiracy to kidnap (A.R.S. §13-331), assault with a deadly weapon (A.R.S. §13-249), and conspiracies to assault with deadly weapons (A.R.S. §13-331). Some of the counts included life imprisonment.

The State of Arizona appointed a "special" prosecutor and the resources of the State of Arizona were directed against the Hanigans. In defending the Hanigans, the Hanigans' lawyers, Alan and Wesley Polley, billed the Hanigans approximately $60,000.00 for their services. The case was protracted, hard-fought, and lasted approximately three weeks. Never, has the government contended otherwise.

The emotional problems of these charges were compounded by incidents of threats and harrassments of the Hanigans. As if the Hanigans were not under enough pressure, rumors were circulated that the Hanigans' pictures were being circulated in the Arizona State Prison so that if they were convicted, they would not last through their prison terms.

Racial relations are particularly explosive, and the venom of the Mexican-American populous has been vented upon the Hanigans.

The issues at the state court trial concerned the credibility of the three complaining witnesses. In the state court trial, the complaining witnesses were confronted with numerous inconsistent statements and misstatements. Because of the lies of the complaining witnesses, the trial jurors did not believe them. Affidavits to this effect were presented to the court. These affidavits were uncontradicted.

During the course of the state court trial it was found that the Mexican government had a financial interest in the litigation, and that in the event the aliens were successful, would be sharing in the bounty.

At the state court trial, the case was orchestrated by Mexican government officials. The witnesses admitted being coached by Mexican officials, and admitted violating the court's admonitions concerning the discussion of the case with witnesses. The witnesses further revealed that since the time of the occurrences they were under 24-hour custody and house arrest by Mexican officials.

Discovery in the case was managed only through the good offices of the Mexican consul. Needless to say, possible expulpatory material was lost to the Hanigans.

Despite these impediments to a fair trial, the Hanigans were acquitted on all counts on October 7, 1977. However, after the verdict,

Hispanic groups began to place pressure on the Federal government to commence a new Federal prosecution. These included full-page advertisements in local press viciously attacking the State prosecution; a lawsuit filed in Washington by the Antiock Law School to force the government to prosecute; and an appearance at the confirmation hearings of Benjamin Civiletti in a further attempt to drag the Federal government into the prosecution of the Hanigans.

Despire the denial of prosecution by William Smitherman because there was "no Federal violation", Griffin Bell, former Attorney General of the United States, declined prosecution, and made pronouncements to that effect, as did A. Bates Butler, III, the ranking prosecutor in the Tucson Office of the United States Attorney. At the time of the dismissal of the lawsuit filed by the Hispanic groups, Attorney Griffin Bell said the Hanigan was over.

The case is now being prosecuted jointly by Michael Hawkins, the United States Attorney for the District of Arizona, and Linda K. Davis of the Civil Rights Division of the Justice Department. Attorney Davis has made clear that this is not a Hobbs Act prosecution, but a political persecution, as she noted at oral argument: "Your Honor, I would initially submit that while this is not a case brought within the technical framework of the Civil Rights Statute designed as such within the Federal Criminal Code, that this is a civil rights case if there ever was one."

Trial Judge Bilby noted as to this prosecution: "I think you would probably agree with me that this is about as far as you can stretch the Hobbs Act."

It is submitted in this Petition that the Hobbs Act has been stretched farther than its designers meant it to go, and farther than the Constitution will allow it.

REASONS FOR GRANTING THE WRIT

Point One

The Ninth Circuit's expansion of the Hobbs Act is without precedent, conflicts with all prior case law, this court's decisions, the rulings of other Federal courts, and the specific Congressional intent under the Hobbs Act, thereby allowing the Hanigans to proceed to trial a second time in violation of due process.

Prior to the Ninth Circuit's decision, there had never been a Hobbs Act case involving circumstances even close to those at bar. In its Opening Brief to the Ninth Circuit, Petitioners' reviewed every single Hobbs Act prosecution and found as follows:

1. No Hobbs Act case has ever involved an extortion of a keyring, a dollar bill, or even a forty-dollar bill.

2. No Hobbs Act case has ever been levied against citizens, in favor of illegal aliens.

3. No Hobbs Act case has ever allowed the imposition of the criminal law based on the effects of individuals unlawfully in the United States allegedly looking for employment.

4. No other Hobbs Act case has occurred when the alleged victims traveled illegally, and trespassed on the alleged violators turf.

5. No case involves a situation where neither the victims nor the perpetrators were involved in a current business at the time of the offense.

6. No case allows a "civil rights" prosecution under the guise of the Hobbs Act.

Even Judge Bilby noted in his Order: "Both parties have acknowledged this as a case of first impression involving aliens and alleged robbery under the Hobbs Act."

The legislative intent of the Hobbs Act does not sanction the use of the Hobbs Act perpetrated by the government in this case.

In the floor debates concerning the Hobbs Act, not one member of Congress argued that

Hobbs Bill was meant to apply to those who were not American citizens. In fact, the floor debate is replete with references to the protection of American citizens from certain types of extortion.

The Hobbs Act was as a direct result of an opinion of this court, and was meant to legislatively close a gap in prior law.

The legislative history of the Hobbs Act shows that the Hobbs Act provisions were meant to protect the levying of tribute from American citizens actually engaged in interstate commerce. The major concerns were the freedom of American citizens to deliver their product to market without the intervention of extortion. The counter-veiling concern was the effect of the Hobbs Act on unions.

Simply put, the Hobbs Act was never intended to extend to this situation, and was never intended to protect illegal aliens not engaged in commerce on their way to look for work, while trespassing on private pro-

perty while illegally in the United States. Mr. Hobbs, in his report from the Committee on the Judiciary to the Congress noted:

"In the light of the testimony and admissions contained in the hearings and of the above-quoted provisions of the Constitution, there must be agreement that those persons who have been impeding interstate commerce and levying tribute from free-born American citizens engaged in interstate commerce shall not be permitted to continue such practices without a sincere attempt on the part of Congress to do its duty of protecting interstate commerce." Report 238, 79th Congress, First Session, at page 10. Thus, even Representative Hobbs made it clear at the inception of the act that it was intended to apply to American citizens on their way to market.

To extend the Hobbs Act to the Hanigans would federalize all local robberies. Under such a situation, who will be prosecuted?

The unpopular defendant, the object of scorn, and the object of intense lobbying efforts. In essence, this time it may be the Hanigans, next time it will be a member of the very group which instigated the current prosecution.

The concerns of this court in Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056 (1971) apply to the case of the Hanigans. Rewis, involved 18 U.S.C. §1952, the socalled travel act. That case recognized that "an expansive travel act would alter sensitive Federal-State relationships, could over-extend limited Federal police resources, and might well produce situations in which the geographic origin of customers, as a matter of happenstance, would transform relatively minor State offenses into Federal felonies. 401 U.S. at 812; 91 S.Ct. at 1059.

These concerns are equally applicable in the case at bar. They were the same concerns voiced by this court in National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465,

49 L.Ed 2d 245 (1976).

It is cruel, illogical, and senseless to subject the Hanigans to prosecution under the facts of this case.

This case is reviewable either pursuant to the mandate of Abney v. U. S., 431 U.S. 658, 97 S.Ct. 2034, 52 L.Ed 2d 651 (1977), or pursuant to the mandates of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949).

It should also be noted, that United States v. Lanza, 260 U.S. 377 (1922), the original dual prosecution decided by this court, held that a permissible dual prosecution can only relate to cases where the act sought to be punished is one over which both sovereigns have jurisdiction.

Based on the words of the indictment in this case, there is no Federal jurisdiction. The indictment is attached to this Petition as Appendix D.

The court need not weigh facts at a trial to decide this issue. This issue is clear from the face of the indictment, that the prosecution is a politically motivated impermissible utilization by the government, of trial by politics. The idea in the prosecution is to break the Hanigans so that they can no longer resist.

It must be noted that the Hanigans are not guilty of the crimes alleged, and a jury of their peers has already agreed.

Point Two

The retroactive application by the District Ccurt and the Court of Appeals of its new, expansive interpretation of the Hobbs Act violates due process.

The events alleged occurred on August 18, 1976.

At that time, this court had not decided United States v. Culbert, 98 S.Ct. 1112, 1117 (1978).

Similarly, at the time of the alleged offenses, there is no way that any reasonable human being could assume that the Hobbs Act could apply to the acts under consideration.

To expand this statute as it has been done, runs afoul of the most fundamental notions of fair play.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), Mr. Justice Brennon wrote for the court: "There can be no doubt that a deprivation of the right of fair warning

can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language....(a)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an Ex post Facto law, such as Article One, Section 10 of the Constitution forbids....if a state legislature is barred by the Ex post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction." (Emphasis Supplied) 378 U.S. at 352-354.

The Hanigans were charged in 1976, were acquitted in 1977 in the State Court, and were not charged by the Federal government until the late stages of 1979.

It is inconsistent with due process, and fairness to allow this prosecution.

CONCLUSION

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

POLLEY & POLLEY
GAYNES & ROCKAFELLOW, P.C.

By _____
Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
: ss.
COUNTY OF PIMA)

ALEX A. GAYNES, being first duly sworn upon his oath deposes and says:

That he is the attorney for the Petitioners Hanigan herein;

That, as such, he has caused to be mailed and/or delivered, two (2) copies of Petitioners' Petition for Certiorari to Review Decision of the United States Court of Appeals for the Ninth Circuit to each of the following persons on the 11 day of April, 1980:

Michael D. Hawkins
United States Attorney
District of Arizona
120 West Broadway
P. O. Box 1951
Tucson, Arizona 85702

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

FURTHER AFFIANT SAYETH NOT.

_____
ALEX A. GAYNES

SUBSCRIBED AND SWORN to before me this 11 day of April, 1980, by Alex A. Gaynes.

Notary Public

My Commission Expires:

3-29-83

APPENDIX A

FILED
Dec 14 1:22 PM '79

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants.	]	No. CR 79-206-TUC-RMB ORDER

Defendants allege five grounds in support of their Motion to Dismiss:

1. Pre-indictment delay;
2. Selective prosecution;
3. Violation of petite policy and double jeopardy;
4. Generalized claim of due process violation;
5. Questions of Federal jurisdiction under the Hobbs Act.

PRE-INDICTMENT DELAY

The Court finds insufficient evidence to support a finding of actual prejudice to the defendants. While one proposed witness has died, her testimony is available from the previous State trial. Furthermore, the defendants have found additional alibi witnesses who did not testify at the previous trial. Lastly, the defendants failed to show any negligence or intentional misconduct on the Government's part.

SELECTIVE PROSECUTION

Both parties have acknowledged this as a case of first impression involving aliens and alleged robbery under the Hobbs Act.

The defendants are unable to point to any other cases involving similar facts where the Government has declined to prosecute; on the contrary, the Government represented that this is the first case of its nature to have been brought to its attention. Under these circumstances, there has been no showing of selective prosecution.

DOUBLE JEOPARDY

The Supreme Court of the United States has repeatedly held that a prosecution of a

Federal crime arising out of the same factual situation which resulted in State prosecution does not constitute double jeopardy. Abbate v. United States, 359 U.S. 187 (1958). Furthermore, the defendants have no standing upon which to predicate a claim that their prosecution violates in some manner the petite policy of the Department of Justice.

GENERALIZED CLAIM OF DUE PROCESS VIOLATION

No specific claims have been made to the Court, and its review of the actions of the United States Attorney's Office, the Federal Grand Jury Transcripts and related matters reveal no violations at this date.

FEDERAL JURISDICTION

The most troublesome aspect of the defendants' Motion is their contention that the Hobbs Act does not extend jurisdiction in the Federal Court over the case in question. Here, it is alleged that three Mexican aliens were traveling from Mexico towards Elfrida, Arizona, in search of work at an agricultural business in the State of Arizona, and the defendants, by virtue of a robbery by force, thereby knowingly and wilfully obstructed, delayed, affected and attempted to obstruct, delay and affect commerce.

Defendants contend that exercising jurisdiction under these facts would destroy the federal-state balance under the Constitution. This contention was answered by the Supreme Court in United States v. Culbert, 98 S.Ct., 1112, 1117 (1978) when it unanimously (8-0) held:

> "With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. The legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes. .

. . Those who opposed the Act argued that it was a grave interference with the rights of the States . . . Congress apparently believed, however, that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so. . . ." 1/

Neither counsel nor the Court has been able to find a case which is factually similar. However, the courts have repeatedly held the language of the Hobbs Act with reference to commerce is broad ("in any way or degree") and should not be interpreted in a restrictive manner. United States v. Culbert, supra. The Ninth Circuit has held that:

> ". . . only a de minimis effect is necessary . . . and the effect need be only probable or potential not actual." United States v. Phillips, 577 F.2d 495 (9th Cir. 1978)

Likewise, the Third Circuit in United States v. Cerilli, 603 F.2d 415,424 (3rd Cir. 1979) recently held:

> ". . . It is not necessary that the purpose of the extortion be to affect interstate commerce, . . . but only that one of the natural effects thereof be an obstruction of that commerce. . . . [A]ll that is required to bring an extortion within the statute is proof of a reasonably probable effect on commerce, however minimal, as a result of the extortion.
>
> . . . Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect. . . ."

1/ As a practical matter, if the Federal Government choses to employ it, the Hobbs Act federalizes the vast majority of extortion and robberies in the country. Whether this should be the policy of the Government is a legislative and executive decision, not a judicial one.

This case approaches the outer reaches of Hobbs Act jurisdiction. Nevertheless, in light of the repeated holdings of the Supreme Court and the Ninth Circuit that the Act is not to be interpreted in a restrictive manner, the defendants' Motion to Dismiss must be denied.

The Clerk of the Court is directed to mail a copy of this Order to all counsel of record.

SO ORDERED this 14th day of December, 1979.

/s/ Richard M. Bilby
Richard M. Bilby
United Stated District Judge

APPENDIX B

JUDGMENT

FILED
Apr 4 11:38 AM '80

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants-Appellants.	]	No. 79-1823 DC# CR 79-206-1-2

APPEAL from the United States District Court for the District of ARIZONA (Tucson)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA(Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 29, 1980

A TRUE COPY
ATTEST 2-Apr 1980
Richard H. Deane
Clerk of Court
by: Oscar Tagle
Deputy Clerk

FILED
Jan. 29, 1980

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants-Appellants.	]	No. 79-1823 DC# CR79-206-1-2 RMB Arizona (Tucson) ORDER

Before: HUG and PREGERSON, Circuit Judges

The Government's motion for summary affirmance is granted. Under the doctrine of dual sovereignty, successive federal and state prosecutions for the same acts do not subject appellants to double jeopardy. Abbate v. United States, 359 U.S. 187 (1959); United States v. Solano, 605 F.2d 1141 (9th Cir. 1979). Appellants' claim that federal jurisdiction is lacking here does not implicate double jeopardy concerns and, together with the other challenges to the indictment made in the district court, is not appealable

at this time. Abney v. United States, 431 U.S. 651 (1977); United States v. Solano, supra.

CR CAL 1/21/80

A TRUE COPY
ATTEST 2-Apr 1980
Richard H. Deane
Clerk of Court
by: Oscar Tagle
Deputy Clerk

APPENDIX C

FILED
Mar 26 1980

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants-Appellants.	No. 79-1823 DC# CR 79-206-1-2 RMB Arizona (Tucson) ORDER

Before: HUG and PREGERSON, Circuit Judges

Appellants' petition for rehearing is denied.

3/5/80

(CR CAL 1/21/80)

APPENDIX D

FILED Oct 10 2:13 PM '79

MICHAEL D. HAWKINS
United States Attorney
Distirct of Arizona
Post Office Box 1951
Tucson, Arizona 85702
Telephone: 602-792-6511
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants.	CR 79-206-TUC INDICTMENT Violations: 18U.S.C. §1951 18U.S.C. §2 (Robbery affecting commerce; Aiding and abetting)

THE GRAND JURY CHARGES:

COUNT ONE

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward Elfrida, Arizona, in search of work at agricultural businesses in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Manuel Garcia Loya, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Manuel Garcia Loya, that is to say, the defendants did unlawfully take and

obtain personal property in the form of United States currency in the approximate amount of thirty-six dollars and clothing from the person and in the presence of Manuel Garcia Loya, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Manuel Garcia Loya and of his companions Eleazar Ruelas Zavala and Bernabe Herrera Mata including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

COUNT TWO

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and and citizens of Mexico, were travelling from Mexico toward Elfrida, Arizona, in search of work at agricultural businesses in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowlingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Eleazar Ruelas Zavala, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical

violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Eleazar Ruelas Zavala, that is to say, the defendants did unlawfully take and obtain personal property in the form of a key ring and clothing from the person and in the presence of Eleazar Ruelas Zavala, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Eleazar Ruelas Zavala and of his companions Bernabe Herrera Mata and Manuel Garcia Loya including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

COUNT THREE

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward Elfrida, Arizona, in search of work at agricultural businesses in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Bernabe Herrera

Mata, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Bernabe Herrera Mata, that is to say, the defendants did unlawfully take and obtain personal property in the form of United States currency in the approximate amount of one dollar and clothing from the person and in the presence of Bernabe Herrera Mata, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Bernabe Herrera Mata and of his companions Manuel Garcia Loya and Eleazar Ruelas Zavala including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

A TRUE BILL

/s/ Kourt D. Wofford
FOREMAN

/s/ Michael D. Hawkins
MICHAEL D. HAWKINS
United States Attorney
District of Arizona

Supreme Court, U.S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1609

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICK W. HANIGAN AND THOMAS H. HANIGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred in refusing to dismiss the pending federal prosecution against them on double jeopardy grounds and that the court of appeals erred in holding that it lacked appellate jurisdiction over other pretrial rulings challenged by petitioners in the court of appeals before their trial.

1. Petitioners were indicted on October 10, 1979, in the United States District Court for the District of Arizona for violation of the Hobbs Act, 18 U.S.C. 1951. On November 13, 1979, petitioners moved to dismiss the indictment based on the grounds, among others, that they are being put in jeopardy a second time by virtue of a previous acquittal in a state prosecution based on the

same occurrence and that the Hobbs Act does not extend to the conduct described in the indictment. On December 14, 1979, the court rejected each claim and denied the motion to dismiss (Pet. App. A).

Before trial, petitioner attempted to appeal the denial of their motion. The court of appeals, however, summarily affirmed, holding (1) under the dual sovereignty doctrine, the federal prosecution does not place defendants in jeopardy a second time for the same offense, and (2) none of the other rulings of the district court are appealable before trial (Pet. App. B).

2. Petitioners' double jeopardy claim rests upon a prior state prosecution arising from the same facts upon which the current federal prosecution is based. It has long been the law that successive state and federal prosecutions in such cases do not violate the Double Jeopardy Clause. *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); accord, *United States* v. *Wheeler*, 435 U.S. 313, 316-317 (1978). The court of appeals was plainly correct in holding that the federal prosecution does not subject petitioners to double jeopardy.

3. Petitioners' claim that the Hobbs Act is inapplicable to this case is not appealable at this stage in the proceedings. *Abney* v. *United States*, 431 U.S. 651, 663 (1977), is precisely on point. *Abney* held that while a double jeopardy claim is appealable before trial, the sufficiency of the indictment in that case under the Hobbs Act is not appealable before trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

DOJ-1980-04